MADAM LOH SAI NYAH

v.

AMERICAN INTERNATIONAL ASSURANCE CO LTD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-04-127-95]
8 JANUARY 1998

INSURANCE: *Formation of contract - Commencement of cover - Premium paid but no policy issued - Claim under Civil Law Act 1956, s. 23 - Agents - Authority of ordinary agent of insurance company - Acceptance of proposal form and premiums by agent - Whether insurance company bound to issue policy*

CONTRACT: *Insurance - Formation - Offer - Proposal form and premium given to agent - Whether insurance company bound to issue policy - Whether contract of insurance in existence before death of deceased - Contracts Act 1950, s. 4*

AGENCY: *Authority of agent - Whether agent can bind insurance company to issue policy - Special authority of agent*

The appellant, the widow of one Chye ('the deceased'), claimed a sum of money from the respondent pursuant to s. 23 of the Civil Law Act 1956 as the lawful nominee of the deceased under a personal accident insurance policy ('the policy') allegedly issued by the respondent.

The employer of the deceased had paid the premium on 24 June 1977 by cheque to one Boo, an insurance agent of the respondent. On 26 June 1977, the deceased met with a fatal road accident. The premium was received by the respondent on 27 June 1997, ie, one day after the death of the deceased, and the proposal form was received on 30 June 1997, ie, four days after the death of the deceased.

The respondent refused to pay the sum insured on the basis that the policy was not issued, or alternatively, if it was issued, it was conditional that no liability was undertaken until the proposal had been accepted and the premium paid in full. It was argued that there was no contract of insurance between the deceased and the respondent on the date the deceased passed away. It was

further argued that the appellant was neither a trustee under the alleged policy nor a personal representative of the estate and was not, therefore, competent to bring the action.

Held:

Per Abdul Malek Ahmad JCA

[1] The offer came from the deceased but there was yet to be an acceptance from the respondent. As such, no contract of insurance between the deceased and the respondent existed on the date of the deceased's death.

[2] An ordinary agent of an insurance company has no authority to bind the company by a contract to grant a policy. The agent is only authorised to the extent of collecting the proposal form and the payment but has no authority whatsoever to accept the offer of the proposer. In order to bind the company, it must be shown that the agent has special authority to accept the proposal on behalf of the insurance company.

[3] Since there was no contract of insurance and the appellant could not be a beneficiary, she was not competent to sue.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu, balu seorang yang bernama Chye ('si mati'), telah menuntut satu jumlah wang daripada responden selaras dengan s. 23 Akta Undang-Undang Sivil 1956 sebagai penama sah di sisi undang-undang bagi si mati di bawah satu Polisi Insurans Kemalangan Peribadi ('polisi tersebut') yang dikatakan telah dikeluarkan oleh responden.

Majikan simati telah membayar premium tersebut pada 24 Jun 1977 melalui cek kepada seorang bernama Boo, seorang ejen insurans responden. Pada 26 June 1977, simati telah menemui kemalangan maut. Premium tersebut telah hanya diterima oleh responden pada 27 Jun 1977 iaitu satu hari selepas kematian simati, dan borang cadangan telah diterima hanya pada 30 Jun 1977 iaitu empat hari selepas kematian simati.

Responden enggan membayar jumlah yang telah diinsuranskan itu atas dasar bahawa polisi tersebut telah tidak dikeluarkan dan secara alternatifnya, jika ianya telah dikeluarkan, ianya adalah bersyarat bahawa tiada tanggungan telah sanggup dilaksanakan sehingga cadangan tersebut telah diterima dan premium dibayar sepenuhnya. Adalah dihujahkan bahawa tidak terdapat kontrak insurans di antara si mati dan responden pada tarikh si mati meninggal dunia. Mereka seterusnya berhujah bahawa perayu tidak mempunyai pemegang amanah di

bawah polisi yang dikatakan itu mahupun seorang wakil persendirian hartapusaka tersebut dan telah tidak, dengan itu, kompeten untuk memulakan tindakan tersebut.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Tawaran tersebut datang daripada simati tetapi masih belum terdapat penerimaan daripada responden. Oleh yang demkian, tiada kontrak insurans wujud antara si mati dan responden pada tarikh kematian di mati.

[2] Seseorang ejen biasa syarikat insurans tidak mempunyai kuasa untuk mengikat syarikat tersebut melalui satu kontrak untuk memberikan satu polisi. Ejen tersebut adalah hanya diberi kuasa setakat mengutip borang cadangan dan pembayaran tetapi tidak mempunyai kuasa apapun untuk menerima tawaran pencadang tersebut. Untuk mengikat syarikat tersebut, adalah mesti ditunjukkan bahawa ejen tersebut mempunyai kuasa khas untuk menerima cadangan tersebut bagi pihak syarikat insurans tersebut.

[3] Oleh kerana tidak terdapat kontrak insurans, dan perayu tidak boleh menjadi seorang benefisiari, maka beliau tidak kompeten untuk mendakwa.

[Rayuan ditolak dengan kos.]

Cases referred to:
Borhanuddin Hj Jantara & Anor v. American International Assurance Co Ltd [1987] 1 MLJ 22 ***(refd)***
Canning v. Farquhar [1886] 16 QBD 727 ***(refd)***
Far East Corp Ltd v. Shun Cheong Steam Navigation Co Ltd [1962] 28 MLJ 344 ***(cit)***
Fielding and Platt Ltd v. Najjar [1969] 2 All ER 150 ***(cit)***
Ladd v. Marshall [1954] 1 WLR 1489 ***(cit)***
Linford v. The Provincial Horse and Cattle Insurance Co (SC 10 Jur (NS) 1066 11 LT 330 ***(refd)***
Murfitt v. Royal Insurance Co Ltd [1923] 38 TLR 334 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 23(3), (4)
Contracts Act 1950, s. 4

Other source referred to:
General Principles of Insurance Law, ER Hardy Ivamy, 6th edn, p 111

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-7-86]

For the appellant - Darshan Singh; M/s Darshan Singh & Co
For the respondent - Dato' Dominic Puthucheary; M/s Skrine & Co

Reported by Ling Hea Hoon

JUDGMENT

Abdul Malek Ahmad JCA:

We heard and decided on this appeal in Penang on 16 June 1997 and now give our reasons for dismissing it with costs and ordering the deposit to go to the respondent to the account of their taxed costs.

The appellant, as plaintiff and the widow of Chye Kee Jin, deceased, claimed a sum of twenty thousand dollars, which was the Malaysian currency at the time the statement of claim was filed in 1979, interest and costs, as the lawful nominee of the deceased under a Personal Accident Insurance Policy No. P57-0009117 dated 24 June 1977 allegedly issued by the respondent, who was the second defendant in the trial court. The first defendant was Boo Teng Chuan (hereinafter "Boo") who according to the appellant was at all material times the respondent's employee, servant and agent.

As pleaded in the appellant's statement of claim, on 24 June 1977, the employer of the deceased paid the premium of one hundred and ninety five dollars by cheque which sum was accepted by the respondent through Boo on the same day. On the 26 June 1977, the deceased met with a fatal road accident in Dungun, Terengganu.

As nominee and beneficiary, the appellant had claimed the insured sum from Boo and the respondent. By letter dated 14 October 1977, they admitted liability and agreed to advance the sum of ten thousand dollars on approval of the claim and the balance upon extraction of the letters of administration. However, by letter dated 21 December 1977, they refused to pay the insured sum. Accordingly, on 12 May 1978, the appellant through her solicitors demanded the insured sum.

The respondent denied the issue of the policy and alternatively, if it was issued, it was conditional that no liability was undertaken until the proposal had been accepted and the premium paid in full. The said condition was stated on the proposal form submitted by the deceased.

The respondent had also pleaded in their statement of defence that the premium was received one day after the death of the deceased and payment was by cheque not issued by the deceased himself. Further, the proposal form was received by the respondent only on 30 June 1977 tour days after the death of the deceased. There was, therefore, no contract of insurance between the

deceased and the respondent on the date the deceased passed away. Also, the appellant was neither a trustee under the alleged policy nor a personal representative of the estate and was not, therefore, competent to bring the action.

As regards the letter dated 14 October 1977, the respondent had explained that upon learning of the death of the deceased, they had written to the solicitors of the appellant and one Voon Swee Yew, alleged to be the administratrix of the deceased's estate, enclosing a certain form known as the claimant's statement to be completed by the appellant and requesting for certain documents in order for them to consider the claim by the appellant. They had never admitted liability at any stage especially when the signature on the proposal form was not similar to the specimen signature of the deceased. After considering the claim, they wrote to the appellant's solicitors on 21 December 1977 stating that they were not liable.

The learned Sessions Court judge had dismissed the claim after a full trial and on appeal, the learned High Court judge had dismissed the appeal with costs.

The policy document was never produced at the trial and the learned Sessions Court judge held that although a policy number was given, it was never issued. However, on the date fixed for decision, learned counsel for the appellant had sought to adduce further evidence to produce the policy document. The application was oral and not supported by any affidavit. It was refused by the learned Sessions Court judge following *Ladd v. Marshall* [1954] 1 WLR 1489 primarily on the consideration that there was no evidence to show that the policy document, presumably to be believed, could not have been obtained with reasonable diligence for use at the trial and which, if it had been produced, would probably have an important influence on the result of the case though it need not be decisive. Further, the appellant had not earlier sought any adjournment to enable her to produce the policy document.

The learned Sessions Court judge also found, following *Canning v. Farquhar* [1886] 16 QBD 727, that if the premium is offered and accepted, there is at once a contract of insurance. Here, she held that the offer came from the deceased but there is yet to be an acceptance from the respondent. We would like to pause here to state the circumstances in *Canning's* case *(supra)*. There, the proposal was accepted at a specified premium but upon the terms that no insurance should take effect until the premium was paid. Before tender of the premium, there was a material alteration in the state of the health of the proposer and the company refused to accept the premium or to issue a policy.

It was held that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy. The question was, however, left open as to whether if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium and to issue a policy.

Boo was only an ordinary agent of the respondent. The learned Sessions Court judge had referred to *Linford v. The Provincial Horse and Cattle Insurance Co* (SC 10 Jur. (NS) 1066; 11 LT 330) where it was held that an ordinary local agent of an insurance company is not, without special authority, authorised to bind the company by a contract to grant a policy. In that case, the London agent of a country insurance company accepted the premium from the proposer together with the proposal form, both of which he never tendered to the insurance company as he had misapplied the money. When the plaintiff incurred loss, the company repudiated liability.

It was decided that there was no contract binding on the company and that it was not the ordinary duty of such an agent to grant, or contract to grant, policies of insurance and that no special authority had been proved. What the plaintiff had done was to make a proposal with a deposit which the company was entitled either to accept or reject, and since the company had never accepted it, they were not bound. In fact, there is the footnote on the proposal form in the instant case that "No liability is undertaken until the proposal has been accepted and premium paid in full".

The learned Sessions Court judge went on further to say that the appellant had no capacity to sue as she was never appointed trustee under the policy as provided under sub-s. (3) of s. 23 of the Civil Law Act 1956 (hereinafter 'the Act'). She also did not sue as a personal representative of the estate. On her behalf, it was argued that the money claimed did not form part of the estate and no grant of letters of administration was required.

For ease of reference, s. 23 of the Act reads:

> 23. Moneys payable under policy of assurance not to form part of the estate of the insured.
>
> (1) A policy of insurance effected by any man on his own and expressed to be for the benefit of his wife or his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.

(2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.

(3) The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or legal personal representatives in trust for the purposes aforesaid.

(5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Pursuant to sub-s. (4) of s. 23 of the Act, in default of the appointment of a trustee, the policy on its being effected vested in the insured and his legal personal representative in trust for the appellant. On the death of the deceased, there was no application of a trustee under sub-s. (5) of s. 23 of the Act and the policy remained vested in his legal personal representative. All these, of course, become academic if there is no contract of insurance in the first place.

In the appeal at the High Court, learned counsel for the appellant raised a number of issues but learned counsel for the respondent concentrated on only one and that is that there was no acceptance of the proposal on the part of the respondent. There was, therefore, no contract of insurance between the deceased and the respondent on the date the deceased died and as the appellant was not nominated as a beneficiary of the deceased, she was not competent to commence the action.

The learned High Court judge on appeal in his judgment had cited s. 4 of the Contracts Act 1950 which states:

4(1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

(2) The communication of an acceptance is complete

(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and

(b) as against the acceptor when it comes to the knowledge of the proposer.

(3) The communication of a revocation is complete:

(a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and

(b) as against the person to whom it is made, when it comes to his knowledge.

The learned High Court judge went on to say:

> From the facts of this case, is clear that the proposal had not come to the knowledge of the second defendant, because the proposal was only received at the second defendant's office on 30 June 1977, whereas the deceased had died on 26 June 1977.
>
> Furthermore, even if the proposal had come to the knowledge of the second defendant (which in my judgement it had not) there would still be no contract as against the second defendant until the acceptance had come to the knowledge of the deceased. Here, on the facts, the proposal did not reach the second defendant until after the deceased had died, no acceptance was ever made, nor was it communicated and it could never had come to the knowledge of the deceased because the deceased had died earlier.
>
> So, according to the provisions of s. 4(1) and (2) of the Contracts Act 1950 no contract was formed as between the deceased and the 2nd defendant.

He had also distinguished the case of *Borhanuddin bin Haji Jantara & Anor v. American International Asssurance Company Limited* [1987] 1 MLJ 22 which was referred to him but found that on the facts in that case, the matter turned on the provision of declaration (c) of the proposal form and the conditions of payment stated on the receipt.

In *Borhanuddin's* case *(supra)*, the deceased was a flight stewardess who died in a plane crash on 4 December 1977. She had submitted a proposal form completed and duly signed by her to the respondents on 21 November 1977 proposing to insure her life for a sum of fifty thousand dollars with an additional accident benefit of another sum of fifty thousand dollars. She paid

a hundred and eighteen dollars on 2 December 1977 in cash and a receipt was issued by the respondents.

Declaration (c) of the proposal form stated that the assurance takes effect only after a policy is issued and the first premium paid. The receipt by the respondents for the cash sum paid did not state whether the payment was a deposit or a premium. No policy was ever issued to the deceased although a policy number was assigned to the documents in question. The respondents relied on declaration (c) and said that they did not have to pay the assured sums to the deceased contending that no contract was ever concluded. The estate of the deceased argued that acceptance of the payment of the cash sum two days before the death of the deceased was acceptance of the proposal. The High Court decided in favour of the respondents.

On appeal, the Supreme Court held that the terms of the receipt were not binding since it was not issued contemporaneously as required by the terms of the declaration in the proposal form and that the payment of the cash sum was for the first premium and since the respondents would have issued the policy if the deceased had not died, a contract of assurance was concluded when the respondents accepted payment of the premium from the deceased on 2 December 1977.

In the appeal before us, unlike *Borhanuddin's* case *(supra)*, the payment was received by the agent before the deceased died but it was received by the respondent and the receipt issued one day after the date of the death of the deceased and the relevant proposal form was received only four days after the deceased died thus on the date of death of the deceased, the contract of insurance had not come into being. We, therefore, agreed with the learned High Court judge that the facts here were not quite the same.

The learned High Court judge also agreed with the finding of the learned Sessions Court judge that Boo was an ordinary agent of the respondent and had no special authority to bind the latter to grant a policy. There was also no proof of any special authority for Boo to accept the proposal on behalf of the respondent. This is strengthened by the clear words in the lowest column in the proposal form which states:

> I hereby warrant the above particulars are true and I agree that this proposal shall be the basis of the contract between myself and the company.
>
> Date 24.6.1977
>
> Agent or broker (Sgd) Proposer's Signature (Sgd)

Note: No liability is undertaken until the proposal has been accepted and premium paid in full.

As such, it is only the respondent who can accept the offer.

Learned counsel for the appellant, in asking the court to apply the decision in *Murfitt v. Royal Insurance Co. Ltd.* [1923] 38 TLR 334, submitted that the respondent was estopped from denying liability as judgment had been entered against Boo as agent of the respondent. Boo was in fact subpoenaed by the respondent for the trial but was not called.

In *Murfitt's* case *(supra),* the plaintiff was the owner of an orchard and nursery garden in Cambridgeshire. Alongside his ground there was a railway belonging to the Great Eastern Railway Company. Owing to the hot and dry weather during the summer of 1921, many fires were caused by sparks from locomotives and the plaintiff insured his trees and growing fruits against damage by fire. He was acquainted with one Allwood, a local agent of the defendants, and he submitted to him a proposal for an insurance for three thousand pounds. On 17 July 1921, Allwood said that if the plaintiff did not effect any other insurance meanwhile, he could send in the proposal to the defendants and would hold the plaintiff covered pending a decision by the defendants whether they would accept the proposal or not.

On 22 July 1921, before the defendants had come to a decision, there was a fire in the nursery and the plaintiff's trees and fruits were damaged to the extent of slightly over six hundred sixty four pounds. Subsequently, the defendants refused to accept the proposal, and they declined also to pay anything to the plaintiff on the ground that Allwood had no authority to undertake that the plaintiff should be held covered. Allwood was a subordinate agent of the defendants and the dispute turned on the extent of his authority. On the head of holding out, the evidence showed that on two previous occasions, the plaintiff had insured motor-bicycles with the defendants through Allwood, and on each occasion Allwood had given him cover in the same way as in the present case and his action had been ratified by the defendants.

In his submissions, learned counsel for the respondent agreed with learned counsel for the appellant that the decision in *Murfitt's* case *(supra)* is good law but then the special facts in that case was that the agent occupied a position in which he might well have been authorised to give oral cover, and he had been habitually given it twice before, to the knowledge of his superiors and with their consent. In the instant case, the respondent had no knowledge that Boo was their agent and no consent was ever given by them.

Learned counsel for the appellant had also brought to our attention *General Principles of Insurance Law Sixth Edition* by E.R. Hardy Ivamy at p. 111 where the author states:

> Thus, where the premium to be charged has to be settled by the insurers after consideration of the particulars furnished by the proposer, the offer to enter into a contract of insurance is made by the insurers when they settle the premium and inform the proposer of this fact, whilst the proposer, by tendering the premium, accepts their offer and does not merely offer to contract with them upon their terms.

The author further states at p. 117:

> Since the proposal form, in practice, proceeds from the insurers, it further shows the terms upon which they too are willing to contract. They are bound, therefore, after acceptance, to issue a policy in accordance with the proposal.

Then, at p. 128, he states:

> Where no policy has been issued to the proposer before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive, may raise the presumption, in the absence of any circumstances leading to a contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss.

A careful check of the relevant text shows that learned counsel had only chosen the excerpts which sound favourable to him. As for the first excerpt, it is actually preceded by the following passage at p. 110:

> The offer to enter into a contract of insurance may, as a general rule, be considered as addressed to the insurers by the person who is seeking to protect himself by insurance against loss. He may have been invited by the insurers to put himself into communication with them; but, whether the invitation comes to him from the insurers direct, or through the medium of an agent, or whether it is given to him personally, or only as a member of the public through an advertisement, the position remains unchanged, and he must submit his proposal, which they may accept or decline at their pleasure. The offer, therefore, proceeds from the proposed assured when he has filled up the proposal and forwarded it to the insurers.

The second excerpt is also preceded by the following extract which appears at the bottom of p. 116 and the top of p. 117:

> The proposal form, when duly filled in and signed by the proposed assured and forwarded to the insurers, operates as a formal offer by the proposed assured to the insurers to enter into a contract of insurance. The proposal form shows the terms on which he is willing to contract, and if the offer is accepted, he cannot insist on having an insurance differing in its terms from those specified in the proposal.

Eventually, we found that these excerpts cited by learned counsel for the appellant do not actually assist the appellant in any way as, read with the other passages, the respondent, on the facts of the instant case, had yet to accept the proposal of the deceased.

As for the default judgment entered against Boo, we were of the view that it cannot act as an estoppel against the respondent. Boo chose not to defend for reasons best known to himself. He probably knew he had nothing to lose even if the judgment is entered against him. Further, the facts and issues had not been adjudicated in the case of Boo as it was only a judgment in default. There is nothing to estop the respondent. Especially so since we had found that Boo had no authority to contract on behalf of the respondent, whatever judgment against Boo cannot bind the respondent.

Learned counsel for the appellant argued that the proposal form is dated 24 June 1977 and so is the cheque given by the employer who had himself testified that he gave the cheque to Boo who took it with the proposal forms for the deceased and four of his colleagues. Learned counsel, however, concedes that the policy, when issued, is always dated later than the proposal form.

Despite this concession, he submitted that it is clear that the proposal was accepted on 24 June 1977. The failure by Boo to promptly bank in the cheque cannot affect the appellant's rights. In any event, the delay in banking in the cheque may be explained by the fact that the proposal form was signed in Bukit Mertajam and the cheque and proposal form had been sent to Kuala Lumpur. Citing *Far East Corporation Ltd. v. Shun Cheong Steam Navigation Co. Ltd.* [1962] 28 MLJ 344 and *Fielding And Platt, Ltd v. Najjar* [1969] 2 All ER 150, he said that a cheque and promissory note respectively is as good as cash.

Learned counsel for the appellant continued his submissions by saying that in law and in these circumstances the contract was completed where Boo accepted the filled in proposal form together with the cheque on 24 June 1977. The respondent was, therefore, liable. Since the proposal form describes the appellant as the beneficiary, no grant of letters of administration was necessary and she had the capacity to sue.

We do not dispute the fact that the proposal form and the relevant payment was made on 24 June 1977 to Boo. We were of the view that Boo was authorised to act on the respondent's behalf only to the extent of collecting the proposal form and payment but he had no authority whatsoever to accept the offer of the proposer. The respondent issued the receipt of the relevant payment on 27 June 1977 and received the proposal form on 30 June 1977. On the latter date, they had yet to accept the proposal. But the deceased had died on 26 June 1977.

We could only conclude that there is as yet no contract of insurance between the deceased and the respondent on the date of the deceased's death. The respondent cannot be held to be liable. It follows that since there was no contract of insurance and the appellant cannot be a beneficiary, she is not competent to sue.

From the reasons stated above, we had agreed with the learned Sessions Court judge at the trial stage and with the learned High Court judge at the appeal stage that the appellant had no case against the respondent. This appeal was accordingly dismissed with costs.